Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

STUART H. SMITH, JR.

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED FOR REVIEW

I.

Was the Court of Appeals in error in affirming the Judgment of the District Court in denying petitioner's Motion to Set Aside a Judgment for Fraud upon the Court under Rule 60 (b) of the Federal Rules of Civil Procedure where the true condition and operational status of the vessel's mechanical equipment were concealed by counsel and engineering supervisory personnel.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit in STUART SMITH, JR. VS. WATERMAN STEAMSHIP CORPORATION, 00-CV-1878, (B), is set forth in the Appendix hereto.

The Memorandum of Decision of the District Court for the Eastern District of Louisiana in STUART SMITH, JR. VS. WATERMAN STEAMSHIP CORPORATION bearing number 00-1878 (I) (B) (5) is set forth in the Appendix hereto.

STATEMENT OF THE BASIS FOR JURISDICTION

The final Judgment of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the District Court for the Eastern District of Louisiana, was entered on January 3, 2002. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. 28 U.S.C. Section 2101 (c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254 (1)

STATEMENT OF THE CASE

On June 10, 1992, Petitioner, STUART H. SMITH, JR., joined the STONEWALL JACKSON, as a member of the crew, in the Port of New Orleans, Louisiana.

The STONEWALL JACKSON is an oceangoing cargo vessel owned and operated by Waterman Steamship Corporation. The STONEWALL JACKSON is propelled by a high pressure steam turbine. Steam generated by the ship's boilers drives the turbine geared to the propeller shaft. The steam enters the turbine through a throttle valve and impinges on the rotor blades which impart movement to the rotor, and through a series of reduction gears causes the propeller shaft to rotate.

The turbine consists of ahead and astern elements, used alternately to move the ship forward or astern. The propeller is reversed by closing the ahead throttle valve and opening the astern throttle valve to permit the steam to enter the astern element. With the astern valve opened and the ahead valve closed, the propeller reverses direction and the ship's forward movement is arrested. If while moving astern, ahead motion or a reduction in astern motion is desired, the operation is reversed.

SMITH joined the ship as a licensed officer on June 10, 1992 at the commencement of Voyage No. 67. Voyage 67 terminated on September 29, 1992 and Voyage 68 commenced on October 30, 1992.

On October 3, 1992, STONEWALL JACKSON was berthed in the Mississippi River in New Orleans. At 12:05 p.m., the vessel left her berth to proceed on her voyage. SMITH was assigned on the vessel's stern as the mooring lines were let go and the ship was moved away from the dock. SMITH was instructed by the Master to estimate and report distances from the ship to the wharf as the STONEWALL JACKSON, approximately 900 feet in length, turned to head down river.

As the ship began to turn, SMITH was required to proceed from the starboard cantilever to the stern, across the stern, and then to end of the port cantilever, a distance of 60 yards in order to be in a position to report distance estimates. As the ship was 90 degrees to the course of the river, the

closest point of the ship to the wharf was 250 feet, with her stern to the wharf.

For reasons never clearly determined, the ship backed into the wharf causing damage of approximately $150,000.00.

Subsequent to the allision, the Coast Guard Form 2692 was completed by the owner's representative and an investigation conducted by the Coast Guard Marine Safety Office. The report was prepared by an attorney representing Waterman, on the basis of information from sources never identified, contained a statement that the vessel's equipment was working properly at all times.

On October 4, 1992, SMITH was brought before the Master and an entry made in the Log Book to the effect that Third Office SMITH's employment was terminated because he gave inaccurate information to the Master during the operation on October 3rd and thereby causing the allision.

On October 8, 1992, pursuant to the Freedom of Information Act, SMITH requested copies of all investigative material including Coast Guard Form 2692 which had been submitted by Waterman to the Coast Guard authorities.

On July 16, 1993, because his Collective Bargaining Agent failed to acknowledge a grievance, SMITH brought a Complaint in the United States District Court against his employer, Waterman, for a wrongful discharge. Waterman answered and set forth the defense that pursuant to the statutory authority, the Coast Guard had investigated the incident; that it had conducted interviews with the Master, Pilot, Third Mate SMITH, and Chief Mate resulting in the conclusion that the collision was due solely to the fault of petitioner for his failure to give accurate reports.

SMITH's efforts to obtain Coast Guard investigative material were unsuccessful, and the complete record was never made available.

On November 30, 1993, Waterman brought a Motion for Summary Judgment, Or In the Alternative, To Dismiss Pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure. On January 4, 1994, the Coast Guard granted Waterman's Motion For Summary Judgment.

The Court accepted the findings and conclusions of the Coast Guard Investigating Officer which attributed sole

fault for the allision to Petitioner for failure to report correct estimates of distance to the Master and Pilot.

In its Reasons for Judgment, the Court made no reference to any other facts or conditions which may have contributed to the casualty. Petitioner's efforts to obtain the Record of the Coast Guard Investigation were unsuccessful and resulted in a suit by Petitioner against the Coast Guard pursuant to the Freedom of Information Act. In granting judgment against the Coast Guard, the District Court characterized the Coast Guard's action in failing to make the documents and material available as grossly negligent. However, the Court did not order the Coast Guard to produce the records.

The critical aspect of the information contained in the Coast Guard Report was the condition of the ship's machinery and the representation by counsel for the owner, as well as the supervising engineer, that all equipment was operating properly.

In June, 1992, before SMITH went aboard the STONEWALL JACKSON and during the course of Voyage No. 66, problems were experienced with the ship's astern steam throttle valve.

Item No. 4 on the Voyage Repair List included a notation:

> "(b) The astern servo has remained partly opened on several occasions while maneuvering and has had to be closed with a chain fall. Approximately 100 psi of steam pressure was showing on the gauge and steam continued to leak pass the guarding valve when it was closed. The astern servo never closes completely in maneuvering but will close itself while remaining at full sea speed with a higher speed limit oil pressure. Temporary washers were installed on the wrong direction switches on the astern servo to prevent false alarms, remove the washers to enable the switches following repairs..."

At the commencement of Voyage 67, on September 29, 1992, Robert Potter, Waterman's Supervisory Engineer, advised the turbine manufacturer that the astern steam throttle valve continued to stick in the open position thereby causing the problem when maneuvering.

On September 30, 1992, under the supervision of Potter, the linkage between the control mechanism and the astern valve was removed and adjusted. Realignment was completed on October 1, 1992, only 48 hours before the allision.

On October 3, 1992, the turbine manufacturer's representative boarded the STONEWALL JACKSON at Waterman's request to ascertain that the astern steam throttle valve was functioning properly.

As the ship maneuvered back to her berth, the turbine manufacturer's representative noted that the astern steam throttle valve again stuck in the open position. On October 4, 1992, again under the supervision of the manufacturer and Waterman's representatives, the astern steam throttle valve was completely disassembled and inspected. It was discovered that the valve itself was severely worn and required replacement of several parts to restore it to proper working condition. Waterman made the decision to defer repairs and to permit the ship to sail on her voyage because of time constraints. The turbine manufacturer's representative was aboard the ship on October 4, 1992 when the ship sailed.

At the conclusion of Voyage No. 67, problems were still being experienced with the engine throttle control and were reported once again to Waterman's Supervisory Port Engineer in December, 1992.

On December 30, 1992 and January 6, 1992, the astern steam throttle valves were removed from the ship, disassembled, sandblasted and completely repaired. Notwithstanding the long history of problems with the throttle valve, no report of the casualty or repair was made to the United States Coast Guard as required by 46 C.F.R. 4.05-3.

The Coast Guard Office of Marine Safety was advised of possible problems with the STONEWALL JACKSON's

throttle system, and an inquiry was made through Waterman requesting additional information.

In response to the Coast Guard, the Waterman Port Engineer, stated that he had checked the vessel's logs and found no indication of problems with the vessel's engines, even though he was personally involved with repairs and malfunctions of the mechanism over a period of several months during several port calls.

Relying on the Port Engineer's representations, and without further inquiry or investigation by the Coast Guard, determined that the problem did not warrant further action.

REASONS FOR GRANTING THE WRIT

This action is an independent action pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure which provides:

> "...On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a party's legal responsibilities from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic, which misrepresentation, or other misconduct of an adverse party..."

It is recognized that Rule 60 (b) is an extraordinary remedy and has a significant effect on the desire for finality in litigation. Relief under the rule is reserved for only the most egregious conduct.

In the instant case, the original Coast Guard Form 2692 was not entered in the record, but served as the keystone subsequent of the Coast Guard casualty investigation following the allision. The document was prepared and submitted by counsel for a party, and contained representation that all of the vessel's equipment was

functioning properly. The statement was patently false and known to be false.

Submission of the report resulted in a deliberate misdirection of the investigation, suggesting that the sole cause of the allision was the inaccuracy of Petitioner's distance estimates.

The evidence developed subsequently reinforced the argument that the ship's turbine was not operating properly, and that the Port Engineer falsely represented the operational status of this control mechanism to the Coast Guard Investigating Officer.

In First National Bank of Louisville v. Lustig, 96 F.3d 1554, (CA 5 – 1996) at 1575, the Court determined what misconduct could constitute a fraud on the Court:

> "To establish fraud on the Court, it is necessary to shown an unconscionable plan or scheme which is designed to improperly influence the Court in its decision. Generally speaking, only this most egregious misconduct such as bribery of a judge or member of the jury, or fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the Court. Less egregious misconduct, such as nondisclosure to the Court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the Court..."

Elements which constitute fraud on the Court were also illustrated in Workman v. Bell, 160 F.3d 276, Cert. Den. 121 S. Ct. 1631 , 149 L. Ed. 2d 369:

> "...Elements of fraud on the Court sufficient to allow a grant of relief from judgment are conduct (1) on the part of an officer of the Court (2) that is directed to the judicial machinery itself (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth (4) that is a positive

averment or is a concealment when one is under a duty to disclose and (5) that deceives the Court..."

Fraud on the Court may occur when an acts of a party prevent his adversary from presenting his case or defense. Abatti v. C.I.R., 859 F.2d 115 (CA 9 – 1984) or constitutes action that prevents a party from fully or fairly presenting his case. M/V Peacock v. Complaint of Edwards, 809 F.2d 1403 (CA 9 – 1987).

In Schultz v. Butcher, 24 F.3d 626, (CA 4 – 1994), the Court found that the owner of a passenger vessel was entitled to a new trial under the rule providing for relief from judgment due to fraud, based on the failure of a pleasure boat operator to provide the owner of the passenger vessel with a Coast Guard investigative report, pursuant to a discovery request. The owner of the passenger vessel boat presented a meritorious defense and the pleasure boat operator was in possession of a Coast Guard report which would have helped bolster the defense of the passenger vessel operator, since it implicated the operator of the pleasure craft.

The report submitted to the Coast Guard which precipitated the Coast Guard investigation, was prepared by Waterman's counsel, who was shielded from discovery by the attorney-client privilege. As a corporate representative, counsel, as well as the Waterman Port Engineer who oversaw the continuing repairs to the Engineering Plant aboard the ship, had knowledge of the condition of the astern steam throttle, which, if disclosed at the outset, would have assisted the Petitioner in the presentation of his case.

The Form 2692 prepared by Waterman's counsel was not made available to Petitioner until he brought suit against the Coast Guard pursuant to the Freedom of Information Act.

The STONEWALL JACKSON was sent to sea with a defective throttle mechanism which rendered the vessel unseaworthy. Sending an unseaworthy vessel to sea is a violation of 46 U.S.C. 10908 and is punishable by five years imprisonment. Concealment of a violation of the statute is punishable as a felony under 18 U.S.C. 4.

In view of the seriousness of the violation, it is submitted that this matter justifies the Petition For Certiorari.

The action of Waterman's counsel, as well as the concealment of mechanical problems with the vessel's astern steam throttle valve, constituted fraud sufficient to justify a new trial under Rule 60 (b).

CONCLUSION

For the reasons identified, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit, and ultimately to vacate and reverse the order below and remand the matter to the District Court for trial.

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No. 01-30442
SUMMARY CALENDAR

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STUART H. SMITH, JR.
Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

(00-CV- 1878-B)

Filed January 3, 2002

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges. RBYNALDO G. GARZA, Circuit Judge;[1]

In this appeal, we review a district court's denial of a motion to set aside a judgment for fraud upon the court under Rule 60(b) of the Federal Rules of Civil Procedure. For the following reasons, we affirm the decision of the district court.

I

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third mate aboard the S/S Stonewall Jackson, an oceangoing cargo vessel owned and operated by Appellee Waterman Steamship Corporation ("Waterman") and berthed in the Port of New Orleans. On that day, the vessel was attempting an undocking maneuver, during which Smith was assigned to the vessel's stern and was instructed to estimate and report to the bridge the distance from the vessel to the wharf. During the maneuver, the Stonewall Jackson made

contact with the dock, and the allision caused damage to both vessel and dock.

Waterman reported the incident to the Coast Guard, which conducted an investigation. Waterman also submitted to the Coast Guard a Form CG-2692 that briefly described the incident. The Form CG-2692 indicated that all equipment aboard the vessel was in good working order at the time of the accident, but the parties debate whether the astern servo valve was working properly at the time of the accident.[2] After its investigation, the Coast Guard concluded that Smith failed to relay correct distance information to the bridge and that this failure was the primary cause of the allision. On October 4, 1992, Waterman terminated Smiths employment.

On July 16, 1993, Smith sued Waterman for wrongful discharge in the Eastern District of Louisiana. The district court concluded that Smith was employed at will and could be discharged with or without cause. The court further concluded that Smith was not wrongfully discharged and granted Waterman's motion for summary judgment. Smith v. Waterman Steamship Corporation. et al, No. CA-93-3207-I (E.D. La. Jan. 5, 1994). The Form CG-2692 was never submitted to the court, and the court never relied upon it.

Smith then appealed to this Court. For the purposes of his appeal, we assumed arguendo that Smith could only be discharged for just cause but also concluded that no genuine of material issue of fact existed as to whether Smith was wrongfully discharged. Accordingly, we affirmed the decision of the district court. Smith v. Waterman Steamship Corporation, et al, No. 94-30174 (5th Cr. Sept. 8, 1994). The Form CG-2692 was never submitted to this Court, and this Court never relied upon it.

In the present suit, Smith asked the district court to set aside the earlier judgment tinder Rule 60(b), arguing that the Form CG-2692 constituted a "fraud upon the Court" because it state that all equipment aboard the vessel was in good working order at the time of the accident and there is some debate as

to whether the astern servo valve was in such order. R. at 331. The district court concluded that there was no fraud upon the court. The court found that, because the allegedly fraudulent Form CG-2692 was neither submitted to nor relied upon by the district court or this Court in the prior litigation, there was no link between the information allegedly missing from the form and the judgments entered in the earlier lawsuit. Thus, the district court denied Smith's Rule 60(b) motion. Smith appealed.

II

Rule 60(b) of the Federal Rules of Civil Procedure allows a court to set aside a judgment for fraud upon the court. This Court has stated time and again that it will review a district court's Rule 60(b) ruling solely for an abuse of discretion. Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389, 394 (5th Cir. 2001); In re Al Copeland Enterprises, 153 F.3d 268, 271 (5th Cir. 1998); Ergo Sicence v. Martin, 73 F.3d 595, 599 (5th Cir. 1996). Furthermore, when reviewing the denial of a Rule 60(b) motion, this Court does not review the underlying judgment. Halicki Louisiana Casino Cruises, 151 F.3d 465, 470 (5th Cr. 1998); Williams v. Chater, 87 F.3d 702, 705 (5th Cir. 1996); Schewegmann Rank & Trust Co. v. Simmons, 880 F.2d 838, 844 (5th Cir.
1989).

Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and "the desire for a judicial process that is predictable." Carter v. Fenner, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting Bailey v. Ryan Stevedoring Company, Inc., 894 F.2d 157, 160 (5th Cir. 1990)). Thus, Rule 60(b) relief based on fraud upon the court is reserved for only "the most egregious misconduct." Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989). Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, "defile the court itself," or frauds that are "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for

adjudication." Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). In First National Bank v, Lustig, 96 F.3d 1554 (5th Cir. 1996), this Court further described the kinds of misconduct that could constitute a fraud on the court:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision, Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, wilt not ordinarily rise to the level of fraud on the court.

Id. at 1573 (internal quotation marks and citations omitted). The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its ease," Id.

Smith does not, and cannot, complain that there was a nondisclosure to the court of facts allegedly pertinent to the matter before it. He argues that the Form CG-2692 was a fraud upon the court in the prior litigation. As the district court noted below, the Form CG-2692 was never submitted to either the district court or the appellate court in the prior litigation. Therefore, the Form CG-2682 could not have been a nondisclosure to the court.

In essence, Smith complains that there was a nondisclosure to the Coast Guard of facts allegedly pertinent to the matter before the court. Given our decision in First National Bank, such a nondisclosure would constitute a fraud upon the court in only the rarest of circumstances. Even if the facts allegedly omitted from the Form CG-2692 were pertinent to the matter

before the district and appellate courts in the prior litigation, the omission did not prevent Smith from fully and fairly litigating his case. Neither court considered the Form CG-2692. In fact, the form had absolutely no bearing on the district court's earlier conclusion that Smith was employed at will, a conclusion with which this Court took no issue on appeal.[3]

The district court concluded that the link between the alleged nondisclosure on the Form CG-2692 and the judgment entered in the earlier lawsuit was insufficient to establish a fraud on the court. We find no error in the district court's reasoning. We certainly find no abuse of discretion.

III

Accordingly, we AFFIRM the district court's denial of Smith's Rule 60(b) motion to set aside the prior judgment.

Footnotes

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2] The astern servo valve can affect the vessel's movement. See Appellant Br. at 7—8.

[3] It should go without saying that a court assuming a point arguendo for the purposes of appeal does not hold on that point. Nonetheless, in his complaint, Smith mischaraeterizes this Court's opinion in the earlier appeal as "noting that the Collective Bargaining Agreement tinder which Smith was employed provided that he could only be discharged for just cause." R. at 326; But see Smith v. Waterman Steamship Corporation, et al., No. 94-30174 (5th Cir. Sept. 8, 1994) ("For purposes of this opinion, we will assume arguendo that the collective bargaining agreement between Smith's union and Waterman is sufficient to invoke 46 U.S.C. § 103 13(c) and

that Smith could only be discharged for just cause.") (emphasis added).

CIVIL ACTION NO. 00-1878
SECTION "I"(B)5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.,
Plaintiff,

VERSUS

WATERMAN STEAMSHIP CORPORATION,
Defendant.

MINUTE ENTRY
January 10, 2001
LEMELLE, J.

Argument was heard this date on defendant Waterman Steamship Corporation's 12(b)(6) Motion To Dismiss And Alternatively Motion For Summary Judgment. For the reasons orally rendered,

IT IS ORDERED that defendant Waterman Steamship Corporation's Motion for Summary Judgment is **GRANTED** dismissing plaintiff's complaint.

Supreme Court, U.S.
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MAY 10 2002
OFFICE OF THE CLERK

No. 01-1579

In the Supreme Court of the United States

STUART H. SMITH, JR.,
Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. The Question Presented Fails to Merit Review.

II. The Decision Below is Legally and Factually Correct and Petitioner's Application is Incorrect and Misdirected.

CORPORATE DISCLOSURE STATEMENT

Corporate Disclosure Statement and Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.6:

International Shipholding Corporation

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STATEMENT OF THE CASE

In 1993 Petitioner Stuart H. Smith, Jr. brought suit against his employer, Respondent Waterman Steamship Corporation, incorrectly alleging that he was "guaranteed employment" for 120 days aboard Waterman's vessel. Smith also alleged that he was "wrongfully discharged," in violation of 46 U.S.C. § 10313(c), from Waterman's vessel the day after a collision that occurred between the vessel and a wharf in the New Orleans harbor. Upon completion of discovery, including the depositions of numerous fact witnesses, the United States District Court for the Eastern District of Louisiana granted summary judgment in favor of Waterman and dismissed Smith's Complaint with prejudice.

The district held that Smith's employment with Waterman was "at will" and that he was never guaranteed employment aboard Waterman's vessel for any duration. The district court correctly followed the controlling Fifth Circuit decision in *Smith v. Atlas Off-Shore Boat, Inc.*, 653 F.2d 1057 (5th Cir. 1981), which recognized "at will" employment under the general maritime law: "The maritime employer may discharge the seaman for good cause, for no cause, or even, in most cases, for a morally reprehensible cause." 653 F.2d at 1063. The further district court found that all evidence indicated that Smith was not wrongfully discharged. *Smith v. Waterman Steamship Corp.*, No. 93-2307 (E.D. La., Jan. 5, 1994) (order and reasons granting Waterman's 12(b)(6) motion and alternatively motion for summary judgment).

In view of Smith's "at will" employment status, the district court noted: "Thus the question of whether Smith 2

was wrongfully discharged need not, but will be, addressed by the Court." *Id.* at p. 3. The district court found that "Smith was not wrongfully discharged." *Id.* at p. 4. As to Smith's attempted reliance on his union contract/collective bargaining agreement, both his labor union and district court concluded and found that Smith waived all rights under his union contract when he refused to arbitrate his claim and instead filed suit for wrongful discharge. It was only after Smith's first lawsuit was dismissed that Smith sought to rely upon his union contract in a motion for new trial or rehearing. *Smith v. Waterman Steamship Corp.,* No. 93-2307 (E.D. La. Feb. 23, 1994) (minute entry denying plaintiff's motion for rehearing or new trial).

Smith attempted to conceal the full union contract from the district court and submitted only a selected portion of the contract. The district court noted:

> Attached to plaintiff's motion to rehear are copies of only certain pages of the Agreement, not a copy of the Agreement in its entirety. Conspicuously omitted from the pages provided to the Court are those addressing the arbitration provisions of the collective bargaining agreement.
>
> The attached copy of a letter from the International Counsel to MM&P, provided by defendants in their opposition to plaintiff's motion, sheds light to the Court as to the wherefore of plaintiff's repeated tactical strategy. Addressed to ... MM&P International Counsel Cohen stated therein:
>
> > Smith chose not to assert his rights pursuant to the collective bargaining agreement because if he had, although he would have had

> the benefit of the "just cause" provisions with regard to discharge, he also would have been precluded from litigating by the arbitration provisions of the collective bargaining agreement.
>
> Plaintiff may not seek the protection of an agreement which he elected not to abide by.

Id. at pp. 1-2 (emphasis added.)

That dismissal was affirmed by the United States Court of Appeals for the Fifth Circuit. *Smith v. Waterman Steamship Corp.*, No. 94-30174, Summary Calendar (5th Cir. Sept. 8, 1994).

On June 27, 2000, almost six years after the Fifth Circuit's affirmance of the prior judgment, Smith commenced the instant litigation seeking to set aside the prior judgment under Rule 60(b) of the Federal Rules of Civil Procedure based upon the unfounded allegation of fraud upon the court. Smith alleges that Waterman, through its counsel, perpetrated a "fraud upon the Court" by completing a Coast Guard Form 2692 "Report of Marine Accident" which allegedly contained incorrect information regarding the vessel's equipment at the time of collision. This Coast Guard Form, dated October 6, 1992, was never submitted to the court, and was never relied upon by the court, and was never used or relied upon by Smith. Most importantly, it contained complete and correct information. Mr. J. Kelly Duncan, a partner of the Jones Walker firm, completed and submitted the form to the Coast Guard and later provided an affidavit confirming that Waterman had furnished the information contained in the CG 2692 Form. (Appendix A-19 to A-21.)

After completion of discovery, on January 10, 2001 the district court held oral argument, granted Waterman's motion to dismiss Smith's complaint, and gave oral reasons for judgment which Smith has neglected to provide this Court. (Appendix A-2 to A-14 hereto.) The district court noted that the Coast Guard Form 2692 was not filed with the court in the prior litigation, was not used or referred to by the court, was not relied upon by the district court in the prior litigation, and was not relied upon by the Fifth Circuit. (Appendix A-10 to A-13.) Smith offered no evidence showing that the Coast Guard Form CG-2692 was incorrect and, most importantly, there is absolutely no link between the Coast Guard Report and any information contained therein that led to the alleged perpetration of a fraud upon the court.

The district court took judicial notice of the prior decisions in this case and stated:

> More importantly, I think, is the failure in this case for a link between the Duncan report [i.e., the Coast Guard Form 2692] based on the information that Duncan, the attorney, received from his client Waterman.
>
> There is no link that that information led to the perpetration of some fraud upon the Court, whether it's on the trial court or the Court of Appeals.
>
> There is no indication that there was some reliance by either court on that report or to what extent, if any, the Coast Guard might have relied upon it in making its original report, or even making its revised report.

> That failure for that link, as well as the failure to establish that there was fraud, to begin with, in connection with the report, perhaps inaccuracies, but inaccuracies that apparently the Coast Guard did not change its opinion in regard to matters that would ultimately affect the termination of Mr. Smith.

(Appendix A-11 to A-12.)

By order and reasons entered March 8, 2001, the district court denied Smith's motion for a new trial, another document not submitted by Smith with his application. (Appendix A-15 hereto.) The court reviewed the deposition of Mr. Potter, Waterman's port engineer, whose deposition was belatedly sought by Smith and was available to Smith to prepare his opposition memorandum – and correctly found that it did not present any additional facts from those that were considered at the January 10, 2001 hearing. (Appendix A-16 to A-18.) The district court noted:

> Moreover, Potter's testimony has absolutely no bearing on the fact that the allegedly fraudulent statement was never directed to the court. Even assuming that plaintiff could have been terminated only for just cause, and that Waterman's statement to the Coast Guard was inaccurate due to problems with the astern steam throttle valve, he is not entitled to relief under Rule 60. The evidence does not rise to the requisite level of clear and convincing evidence of fraud on the court. There is no evidence that the allegedly fraudulent statement was ever provided to or considered by the court or that it was designed to improperly influence the court.

(Appendix A-17.) (footnote omitted).

At footnote 1, the court noted:

> Plaintiff continually argues without evidentiary support that he was protected by contract providing for eligibility for employment aboard the S/S STONEWALL JACKSON for 120 days, notwithstanding this court's determination over eight years ago that he was not entitled to such protection. See Smith v. Waterman Steamship Corporation, Civil Action No. 93-2307 (E.D. La.) (Rec. Doc. Nos. 38 and 42).

(Appendix A-17.)

On January 3, 2002, the Fifth Circuit affirmed the district court's dismissal and found as a matter of law and fact that there was no fraud upon the court. The decision below was in full accord with Rule 60(b) of the Federal Rules of Civil Procedure and the precedents interpreting that rule. The Fifth Circuit affirmed the district court's determination because there was no fraud upon the court because the allegedly fraudulent Coast Guard Form 2692 was neither submitted to nor relied upon by the district court or by the Fifth Circuit in the prior litigation, and there was no link between the information allegedly missing from the form and the judgments entered in the earlier lawsuit.

The Fifth Circuit correctly recognized that Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and the desire for a judicial process that is predictable. The Fifth Circuit noted that "fraud upon the court" is reserved for the most egregious types of conduct, not present in this case:

> Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, "defile the court itself," or frauds that are "perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980).
>
> * * *
>
> The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its case." *Id.*

Smith does not, and cannot, complain that there was a nondisclosure to the *court* of facts allegedly pertinent to the matter before it. He argues that the Form CG-2692 was a fraud upon the court in the prior litigation. As the district court noted below, the Form CG-2692 was never submitted to either the district court or the appellate court in the prior litigation. Therefore, the Form CG-2682 could not have been a nondiclosure (sic) to the court.

In essence, Smith complains that there was a nondisclosure *to the Coast Guard* of the facts allegedly pertinent to the matter before the court. Given our decision in *First National Bank,* such a nondisclosure would constitute a fraud upon the court in only the rarest of circumstances. Even if the facts allegedly omitted from the Form CG-2692 were pertinent to the matter before the district and appellate courts in the prior litigation, the omission did not prevent Smith

> from fully and fairly litigating his case. Neither court considered the From CG-2692. In fact, the form had absolutely no bearing on the district court's earlier conclusion that Smith was employed at will, a conclusion with which this Court took no issue on appeal.
>
> The district court concluded that the link between the alleged nondisclosure on the Form CG-2692 and the judgment entered in the earlier lawsuit was insufficient to establish a fraud on the court. We find no error in the district court's reasoning. We certainly find no abuse of discretion.

Smith v. Waterman Steamship Corp., No. 00-30442, Summary Calendar (5th Cir., Jan. 3, 2002) at pp. 4-5, reproduced in Petitioner's Appendix.

ARGUMENT

I. THE QUESTION PRESENTED FAILS TO MERIT REVIEW.

The question raised by Smith does not merit review nor does Smith articulate any "special and important reasons" required by Rule 10 to support the argument that this Court should exercise its discretionary power of review. Rule 10 indicates that there must be a substantial federal question presented to warrant the granting of certiorari. The question presented here relates solely to factual issues on which Petitioner lost below, and does not present substantial issues of law as required by Rule 10, as discussed below.

The Fifth Circuit's decision is not in conflict with a decision of this Court or of another Federal Appellate Court, nor has the Fifth Circuit decided a federal question in a way which conflicts with a state court of last resort. There simply is no evidence that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. Rather, as shown below, the decision below is in full accord with Rule 60(b) and the jurisprudence.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished form that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Smith is merely seeking to re-argue the case which he lost and does not even address Rule 10 or its requirements. This Court has stressed that it does not "sit for the benefit of particular litigants." *Rice,* 349 U.S. at 74. It is therefore submitted that this Court should not exercise its discretionary power of review merely for Petitioner's benefit and this request for certiorari should be denied.

II. THE DECISION BELOW IS LEGALLY AND FACTUALLY CORRECT AND PETITIONER'S APPLICATION IS INCORRECT AND MISDIRECTED.

A. Rigorous Standard of Proof.

Rule 60(b) provides a remedy that "is extraordinary and is only to be invoked upon a showing of exceptional circumstances." *Compton v. Alton S.S. Co.,* 608 F.2d 96, 102 (4th Cir. 1979). As a result, the disposition of a Rule 60(b) motion is within the District court's sound discretion and will not be overruled absent an abuse of such discretion. *Browder v. Director, Ill. Dept. of Corrections,* 434 U.S. 257, 263 n. 7 (1978).

Smith's Complaint alleges "fraud upon the court" through an alleged misrepresentation on a Coast Guard form, which form was never submitted to or considered by any court.

Smith's Complaint, filed more than one year after the judgment, is to be adjudged by the more stringent standard, which weighs heavily in favor of the finality of judgment. *Great Coastal Express, Inc. v. International Brotherhood of Teamsters,* 675 F.2d 1349, 1355 (4th Cir. 1982), *cert. denied,* 459 U.S. 1128 (1983). Smith failed to show by clear and convincing evidence that there was "fraud upon the court" and all doubts were properly resolved in favor of finality of the judgment. *Rozier v. Ford Motor Co.,* 573 F.2d 1332 (5th Cir. 1978); *Federal Deposit Ins. Corp. v. Innovative Telephone Communications, Inc.,* 179 F.R.D. 181, 184 (E.D. La. 1998).

"Fraud upon the court" is typically reserved for only

the most egregious misconduct, which requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision:

> "Fraud upon the court" is grounds for relief under the savings clause of Rule 60(b) and is distinguishable from the "fraud, misrepresentation, or other misconduct" under subsection (b)(3). [Citation omitted.] However, 60(b) relief based on "fraud upon the court" is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.' Id. at 1338 (quoting *England v. Doyle,* 281 F.2d 304, 309 (9th Cir. 1960)). The narrow concept should "embrace only the species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." [Citation omitted.]

Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 871 (5th Cir.), *cert. denied,* 493 U.S. 977 (1989). *See also Rozier,* 573 F.2d at 1338; *Addington v. Farmer's Elevator Mutual Ins. Co.,* 650 F.2d 663, 668 (5th Cir.), *cert. denied,* 454 U.S. 1098 (1981); *First National Bank of Louisville v. Lustig,* 832 F.Supp. 1058, 1061 (E.D. La. 1993), *aff'd in part,* 96 F.3d 1554 (5th Cir. 1996). The alleged fraud must cause "far more than an injury to a single litigant." *Addington,* 650 F.2d at 668. Fraud inter parties without attorney or other court involvement does not rise to the level of fraud upon the court. *Outen v. Baltimore County, Maryland,* 177 F.R.D. 346, 349 (D. Md.), *aff'd,* 164 F.3d 625 (4th Cir. 1998); *see*

also Great Coastal Express, Inc., 675 F.2d at 1356.

Smith's Complaint did not even come close to alleging activities of the egregious misconduct required by Rule 60. Smith's sole basis of wrongful conduct is that Waterman's counsel submitted Form 2692 to the Coast Guard, not the Court. There exists no evidence, then or now, to substantiate Smith's allegations of fraud upon the Court. We refer the Court to Mr. Duncan's Affidavit. (Appendix A-19.) Neither Waterman nor its counsel improperly influenced the court, assaulted its integrity, nor participated in some unconscionable scheme designed to do so. Neither Waterman nor its counsel in any way influenced or directed the Coast Guard, or its investigation.

It is well settled "fraud upon the court" does not occur due to the mere non-disclosure to an adverse party and to the court of facts pertinent to a controversy before the court. *Kerwit Medical Products, Inc. v. N&H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.), cert. denied, 493 U.S. 977 (1989). However, here there was complete disclosure and there is absolutely no evidence of non-disclosure.

B. No Fraud Upon The Court.

The Coast Guard Form, CG-2692, submitted by appellee Waterman to the Coast Guard (not to the court) briefly describes an accident where the stern of Waterman's vessel struck and damaged a dock in the Port of New Orleans. The Addendum to the Coast Guard form recites that all equipment aboard the vessel was in good working order at the time of the incident. Smith contends that the astern

servo valve was not working properly at the time of the accident and that the information in the CG-2692 form somehow constituted a fraud upon the court, even though the Coast Guard form was never submitted to the court and was never relied upon by any court or Smith in the prior litigation. All evidence indicates there was no problem with the astern servo valve at the time of the accident which preceded Smith's discharge from the vessel for failing to properly carry out his assigned job duties.

Smith and his counsel were not denied access to any records or evidence by Waterman, its counsel, or the Coast Guard. In the prior litigation, Smith and his counsel had the opportunity to take discovery, were furnished all statements of fact witnesses, and deposed various fact witnesses, including the master, chief mate and the engineer who was operating the vessel's controls at the time of the accident. All confirmed that there was no problem with the vessel or its equipment at the time of the accident.

It was known and disclosed in the prior litigation that a minor problem was encountered aboard the vessel after the accident when the vessel was being repositioned to the dock. Mr. Potter, the port engineer for Waterman, confirmed that there was no report of any problem with the vessel's astern servo valve at the time of the accident. Years later, in 1996, Mr. Potter received an inquiry from the Coast Guard regarding an alleged valve failure. Mr. Potter responded and confirmed that there was never any type of failure but only an intermittent problem which had been repaired and had nothing to do with this incident. (Appendix A-22 to A-23.) The Coast Guard was satisfied and took no action against Waterman. The Coast Guard's "Incident Brief" concluded that the valve situation did not constitute a "reportable

marine casualty" under the meaning of the Coast Guard's regulations. (Appendix A-25.) Finally, Mr. Potter confirmed that the slight sticking of the valve would not in any way affect the maneuverability of the ship, even if it had occurred at the time of the incident, which it did not.

As of 1996, no part of a marine casualty report is admissible, including facts, opinions, recommendations, deliberations or calculations. 46 U.S.C. § 6308. Smith improperly attempts to rely on additional investigation done by the Coast Guard at the request of Smith. The Coast Guard file was opened for administrative purposes only on March 9, 1998, well after the 1993 litigation was concluded. Nothing that Smith provided to the Coast Guard alters his employment status or provides a basis to relitigate his "at will" employment status. Even though reference to the Coast Guard's supplemental investigation after March 9, 1998 is improper, inadmissible, and irrelevant, for the sake of completeness only it is noted that the Coast Guard's supplemental investigation did not find that the accident was due to a mechanical or equipment problem with the vessel.

Schultz v. Butcher, 24 F.3d 626 (4th 1994), cited by Smith, is inapplicable because it does not involve an application for certiorari. Additionally, that case concerned a motion for a new trial for misconduct, filed in the same proceeding within one year, where a party did not produce a report that was requested by plaintiff in discovery and the report contained information helpful to the adverse party. In contrast, in the instant case there was absolutely no proof of fraud on the court so as to set aside a judgment rendered six years earlier in a separate proceeding.

CONCLUSION

Petitioner seeks a writ based solely on a self-serving, unsupported argument that there was allegedly incorrect fact finding below. Petitioner's allegations of fraud on the court were completely without merit and Petitioner presented no proof of fraud on the court. Petitioner does not even attempt to address Rule 10 and its requirements and his application should therefore be denied.

Respectfully submitted,

RICHARD D. BERTRAM*
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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
January 10, 2001
LEMELLE, J.

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 00-1878
WATERMAN STEAMSHIP CORPORATION	SECTION "I" (B) 5

FILED
2001 JAN 10

Argument was heard this date on defendant Waterman Steamship Corporation's 12 (b) (6) Motion To Dismiss And Alternatively Motion For Summary Judgment. For the reasons orally rendered,

IT IS ORDERED that defendant Waterman Steamship Corporation's Motion for Summary Judgment is **GRANTED** dismissing plaintiff's complaint.

s/s Ivan L.R. Lemelle

DATE OF ENTRY JAN 11 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

STUART H. SMITH, JR.	:	CIVIL ACTION
	:	00-1878 "B"
VERSUS	:	
	:	
WATERMAN STEAMSHIP	:	
CORP.	:	New Orleans, Louisiana
	:	Wednesday, January 10,
: :		2001 9:00 a.m.

Motion held in the above-captioned matter on Wednesday, January 10, 2001, the Honorable IVAN L. R. LEMELLE, United States District Judge, presiding.

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced from dictation.

EXHIBIT A

PROCEEDINGS
MORNING SESSION
(Wednesday, January 10, 2001)

MR. SMITH: May it please the Court, I'm Ralph Smith for Stuart Smith.

MR. KING: Donald King for the defendant and mover, Waterman Steamship, Your Honor.

THE COURT: Gentlemen, you all realize that we have this temporarily from Judge Mentz who is unable to handle the case right now for some health reasons.

MR. KING: That's correct, Your Honor.

THE COURT: I understand from reading the motions and speaking also with Judge Mentz's law clerk that this is a third suit growing out of Mr. Smith's termination as a merchant seaman on the S/S STONEWALL JACKSON.

This particular lawsuit is against the attorney who represented the matter for Waterman.

The Fifth Circuit has already, as I understand it, affirmed the termination case, the wrongful termination case, the first lawsuit in 93-2307.

There is a second suit in 95-1950 under the Freedom of Information Act. That claim was also dismissed by Judge Mentz as moot, so, we now have the claim against the former attorney alleging that he perpetrated a fraud upon the Court by completing a Coast Guard form CG-2692, where he incorrectly stated that all equipment aboard the vessel was in good condition and working order at the time of the allision.

Let me go first to Mr. Smith and then I'll come back to you, Mr. King, with a few questions.

MR. KING: Yes, Your Honor.

THE COURT: Mr. Smith, in the memo by Waterman in response to what you have alleged here, it appears that you're relying upon some investigation by the Coast Guard that led to the reopening, so to speak, of the matter before them, and their conclusion about the cause of the casualty was the failure of the master to order "full ahead propulsion" timely, but as a result, you're saying that your client was unable to continuously and accurately report distances to the wharf, that the casualty could have been prevented by the use of two observers during the maneuvers.

Duncan, however, says that he's only reporting what had been provided to him, and that to the best of his

knowledge, that information didn't contain any false, misleading or incorrect information. Duncan didn't hide or conceal anything.

Further, they say that the revised Coast Guard report does not find that the accident was due to any equipment or mechanical problem with the vessel, even assuming that it was admissible, which they don't believe that it is.

In fact, the report prepared by Duncan was not even referred to or used by Judge Mentz or the Fifth Circuit in their decision.

So, you've got, one, the attorney getting information from the client, and you've got, two, that even assuming that there is some issue about that information, how do you attribute some fraud on the attorney because of that?

MR. SMITH: Well, this suit is not against Kelly Duncan. Kelly Duncan was acting for - -

THE COURT: That is your basis, right?

MR. SMITH: Well, that's the factual basis for the allegation. The Coast Guard Regulations require that someone acting -- well, actually, it requires the owner, operator, master or agent to report accidents, casualties, allisions, what not, to the Coast Guard.

The basis for the Coast Guard's involvement in this case was the 2692 filed by Waterman, but signed by Kelly Duncan, who is -- well, actually he's a partner in Jones, Walker who's representing Waterman. The information was

to the effect that all of the equipment on the ship was operating properly.

Well, we were never able to get the full basis of what the Coast Guard found. We tried everything we could. We tried to take the deposition of the Coast Guard investigating officer in 1993; we were unable to do that.

We tried to take Mr. Duncan's deposition, having completed that form on behalf of Waterman, who was the ship owner and operator. We were unable to do that.

So, we're left with an affidavit by Mr. Duncan who says everything was fine and, obviously we have no way of cross examining Mr. Duncan on that, but we have been able to go out and develop other information to the effect that the ship was not operating properly.

They had a significant problem with the astern steam throttle valve which had preexisted Mr. Smith's service on the ship which had gone back to June of 1992.

THE COURT: Did the Coast Guard actually conclude that this equipment or mechanical problem was the cause of this casualty?

MR. SMITH: They didn't because they were never given that information. We really don't know what the basis of what the Coast Guard determined in its investigation except for that report that came in subsequent to 1992.

THE COURT: So, where is the fraud? If the Coast Guard itself doesn't attribute it to an equipment problem,

even though you're saying possibly that it was, where is the fraud here from the fact that they say "Well, look, we - - "

MR. SMITH: Well, the fraud issue is Mr. Duncan's report and his affidavit that everything was working properly. This original incident occurred on --

THE COURT: There might have been a coffee pot that wasn't working right. That didn't have anything to do with the accident.

MR. SMITH: Well, if it wasn't working right, that's quite possible, but the astern steam throttle valve that wouldn't functioning properly, it's like trying to back your car into a parking lot in a close parking space and the car is stuck in reverse. The problem, we found out, or it was determined much later that when the ship was put in astern, the astern steam valve remained open, and in order to stop the engines to go ahead, someone had to go back there with a mall and actually hit it.

Now, there were denials that that had ever happened, but information at Evans developed subsequent to the original case turned out that that was, in fact, true.

And the astern steam throttle valve was overhauled on September 20th, 1992, completely overhauled. And Mr. Potter, who was the Waterman port engineer or superintendent engineer, his perception was that it was a problem with a servo mechanism, which is a control mechanism for the value.

After this incident occurred, on October the 3rd they

tore down the whole throttle valve and found out that the valve and all of its internal parts were wasted and worn, and that it was necessary to replace it. They didn't want to do that because the time to replace the parts manufactured by De Laval would delay the sailing of this ship, so, the ship sailed anyway.

Ultimately, this did happen; they were replaced, and the valve was repaired.

THE COURT: You rely heavily upon the reopening of the matter by the Coast Guard in its actions back in March of '98, I believe. If, indeed, that would have indicated to you or your client some indication of fraud, how would this lawsuit be considered timely if you accept a one year time limit for bringing this action?

MR. SMITH: Well, Mr. Smith wasn't aware of the Coast Guard's reopening until, I think, 1999. In the interim, of course, the statute has changed, and this Coast Guard report is no longer admissible. Although it's a revision of a report that was issued in 1992, the change in the law now makes that questionable.

THE COURT: Do you acknowledge Judge Mentz and the Fifth Circuit didn't refer to this report prepared by Duncan?

MR. SMITH: You mean, the revision?

THE COURT: No, Duncan's report that you're contesting.

MR. SMITH: Well, Duncan's report is not in the record. In fact, we didn't even know about Duncan's report.

THE COURT: So, if they didn't even rely on it, how is that report a fraud on the Court?

MR. SMITH: 2692 is the basis for the formalized report by the Coast Guard which came out -- well, actually, the formalized report of the Coast Guard, the investigation, is why Mr. Smith was required to file this suit under the Freedom of Information Act, and that finally produced some of the documents and some of the records, but as Judge Mentz said, the Coast Guard was grossly inefficient and grossly negligent in failing to locate the documents that we requested, and further more, failing to produce them and provide Mr. Smith access to them.

Now, obviously the one year is a serious problem because the Coast Guard revision of the report came some five or six years after the original report was actually issued.

THE COURT: All right. Is there anything else that you would like to point out to me?

MR. SMITH: I think basically most of the information is contained in our memorandum.

THE COURT: All right. Mr. King?

MR. KING: Your Honor, do you have any questions? I'll be glad to answer them. I think the Court pointed out many of the inadequacies of plaintiff's motion.

This is quite a remedy that's very difficult to establish fraud upon the Court. Under 60 (b) (3) is a reason in the Federal Rules of Civil Procedure which would allow setting aside of a judgment, but it had to filed within one year. They leave open for possible suit thereafter a fraud upon the Court.

As Your Honor correctly pointed out, the 2692 Coast Guard form was not even a part of the record; it was not relied upon by Judge Mentz; it was not relied on by the Fifth Circuit.

After discovery, taking the deposition of the chief officer, the master, the engineer and two shoreside employees, together with discovery, Judge Mentz issued his summary judgment holding that the employment was at-will. Notwithstanding, although unnecessary to go to whether there was a wrongful termination, the Court did so and determined there was no wrongful termination.

THE COURT: The point that you made about the reliance upon the report in that there was no reliance or reference to the Duncan report by the Fifth Circuit or Judge Mentz, was there reliance by the Coast Guard on Duncan's report?

MR. KING: They didn't mention it, Your Honor. They did their own investigation and took statements of everybody and concluded that Mr. Smith relayed incorrect distances of how far the stern was to the wharf, and that was the cause of the incident.

In the revised reports some several years later, it just said it could have possibly been avoided if there had been

two people stationed back there. It never said that there was any malfunction of equipment.

Depositions have been taken. Our point is, Your Honor, is that there has not even been a showing that the 2692 is incorrect much less that there is some fraud perpetrated upon the Court, which is a very difficult situation to establish.

The plaintiff cites no legal authority at all for his position to the effect that what happened here constitutes a fraud upon the Court.

This is an attempt at re-litigation in an independent action, Your Honor, and all issues have been determined in the original suit, as affirmed by the Fifth Circuit.

THE COURT: Both sides have acknowledged that this revised Coast Guard report did not attribute or did not find or make any conclusions that the accident was due to any equipment or mechanical problems of the vessel.

Even with that lack of finding, have they made some finding one way or another, under the current statute, Title 46, United States Code Section 6308, that revised Coast Guard report would not be admissible for the Court?

MR. KING: That's correct.

THE COURT: But more importantly, I think, is the failure in this case for a link between the Duncan report based on information that Duncan, the attorney, received from his client Waterman.

There is no link that that information led to the perpetuation of some fraud upon the Court, whether it's on the trial Court or on the Court of Appeals.

There is no indication that there was some reliance by either court on that report or to what extent, if any, the Coast Guard might have relied upon it in making its original report, or even making its revised report.

That failure for that link, as well as the failure to establish that there was fraud, to begin with, in connection with the report, perhaps inaccuracies, but inaccuracies that apparently even the Coast Guard did not change its opinion in regard to matters that would ultimately affect the termination of Mr. Smith.

I do recognize, as counsel for Mr. Smith indicated, that there was some extraordinary delay by the Coast Guard in complying with his Freedom of Information Act request.

Judge Mentz dealt with that and found that the three year delay was unreasonable but not in bad faith.

I find that to be not only the law of that case, but to some extent, relied upon here in my decision.

The Fifth Circuit, I think, is clear also to the extent that under the Smith versus Atlas Offshore Boat Service Company case, the Fifth Circuit, 1981, "A maritime employer may discharge a seaman for good cause, for no cause, or even in most circumstances, for a morally irreprehensible cause."

We might disagree with that to some extent, but that law has not been changed in any way by what has happened here when the Fifth Circuit addressed the original Smith matter in 93-2307.

Accordingly, I find that there has been no fraud committed upon the Court based upon the evidence submitted, the records in all cases, which I take judicial notice of, that there might have been some inaccuracies possibly between the parties, but not upon the Court that would ultimately affect this particular case.

I refer you also to the Fifth Circuit case Rozier versus Ford Motor Co., Fifth Circuit, 78, along with Judge Fallon's decision basically which states that to prevail on this type of a motion, the plaintiff must show by clear and convincing evidence that there was fraud upon the Court with all doubts resolved in favor of finality of the original judgment in this case, in effect, two judgments, one affirmed by the Fifth Circuit. And Judge Fallon's case is FDIC versus Innovative Telephone Communications, Eastern District of Louisiana, 1998, and even Judge Mentz's case, The National Bank of Louisville versus Lustig back in 1993.

I'm familiar with Lustig because I was the magistrate judge in that case.

So, I find there has been no evidence of fraud here committed upon the Court.

The parties have had ample opportunity in prior actions, and even in the FOI, to conduct discovery concerning this particular matter.

But ultimately, as I stated before, Smith versus Atlas on termination with our cause, is still the law of the land.

Thank you, Gentlemen. Summary Judgment is granted.

REPORTER'S CERTIFICATE

I, O.J. Robert, Jr., Official Court Reporter, for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date herein before set forth and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/s O. J. Robert, Jr.
O. J. Robert, Jr.
Official Court Reporter
United States District Court
Eastern District of Louisiana

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 00-1878
WATERMAN STEAMSHIP CORPORATION	SECTION (I) (B) (5)

Filed MAR 7 2001

ORDER AND REASONS

Before the court is a Motion for New Trial filed by plaintiff Stuart H. Smith, Jr. seeking reconsideration of the court's January 10, 2001 summary judgment in favor of defendant Waterman Steamship Corporation.

This suit arises out of the October 3, 1992 allision of the S/S STONEWALL JACKSON with a wharf, and the subsequent termination of plaintiff, who was a merchant seaman aboard the vessel, for his role in connection with the cause of the allision. In addition to the present action, Smith filed two prior suits in this court related to the allision. The first suit was against Waterman for wrongful termination; the second suit was against the United States under the Freedom of Information Act seeking the Coast Guard's investigative files regarding the allision.

In the present suit, Smith seeks relief under Federal Rule of Civil Procedure 60 (b) (3) from the judgment entered in favor of Waterman in the wrongful discharge case based

upon an alleged fraud on the court. The alleged fraud was a statement by counsel for Waterman in a Coast Guard form completed shortly after the allision to the effect that all equipment aboard the vessel was in good working order at the time of the allision. Plaintiff's position is that had the court in the wrongful termination action and the Coast Guard been aware of intermittent problems with the astern steam throttle valve, Waterman would not have been able to place the blame for the allision on plaintiff and would not have had cause for terminating him.

On January 10, 2001, this court granted Waterman's motion for summary judgment on the ground that the evidence did not rise to the level of a fraud upon the court, primarily because the allegedly fraudulent report to the Coast Guard was not submitted to the court, nor relied upon by either the district or appellate court.

Plaintiff argues in the present motion for new trial that the court should reconsider the motion for summary judgment taking into account the previously unavailable deposition transcript of Robert Potter, the port engineer for Waterman, as well as facts and argument previously considered by the court in this case and the prior suit.

The court notes initially that plaintiff referred to Potter's deposition testimony in his opposition to Waterman's motion for summary judgment as well as at the hearing on the motion. The fact that the transcript may not have been available at the time of the hearing did not prevent plaintiff from referring to the substance of Potter's testimony. Having now reviewed Potter's deposition transcript, the court finds that it does not present any new facts from those

that were considered at the January 10 hearing.

Moreover, Potter's testimony has absolutely no bearing on the fact that the allegedly fraudulent statement was never directed to the court. Even assuming that plaintiff could have been terminated only for just cause,[1] and that Waterman's statement to the Coast Guard was inaccurate due to problems with the astern steam throttle valve, he is not entitled to relief under Rule 60. The evidence does not rise to the requisite level of clear and convincing evidence of fraud on the court. There is no evidence that the allegedly fraudulent statement was ever provided to or considered by the court or that it was designed to improperly influence the court.

Under these facts, the extraordinary remedy of relief under Rule 60 (b) (3) is not available to the plaintiff. See e.g., Federal Deposit Ins. Corp. v. Innovative Telephone Communications, Inc., 179 F.R.D. 181, 184 (E.D. La. 1998); First National Bank of Louisville v. Lustig, 832 F. Supp. 1058, 1062 (E.D. La. 1993).

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[1] Plaintiff continually argues without evidentiary support that he was protected by contract providing for eligibility for employment aboard the S/S STONEWALL JACKSON for 120 days, notwithstanding this court's determination over eight years ago that he was not entitled to such protection. See Smith v. Waterman Steamship Corrporation, Civil Action No. 93-2307 (E.D. La.) (Rec. Doc. Nos. 38 and 42).

Accordingly,

IT IS ORDERED that plaintiff Stuart H. Smith's Motion for a New Trial is **DENIED.**

New Orleans, Louisiana this 6th day of March, 2001.

s/s Ivan L.R.Lemelle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 00-1878
WATERMAN STEAMSHIP CORPORATION	SEC. I MAG.5 JUDGE MENTZ MAG. JUDGE CHASEZ

AFFIDAVIT OF J. KELLY DUNCAN

PARISH OF ORLEANS
STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared:

J. KELLY DUNCAN

who, after being duly sworn, did depose and testify that:

1. He is a resident of Orleans Parish, of the full age and majority, and has personal knowledge of the facts attested to herein;

2. He is 46 years of age, was admitted to the Louisiana Bar in 1979 and has been a practicing attorney for over 20 years. He has been a partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P. since 1984;

EXHIBIT 6

3. He acted as attorney for Waterman Steamship Corporation and investigated the accident involving the S/S STONEWALL JACKSON at the Poland Street Wharf occurring on or about October 3, 1992 and, in this regard, completed the Coast Guard Form CG-2692 and the Attachment "A" thereto, dated October 6, 1992 (the "CG-2692"), copy attached as Exhibit 1, in accordance with information obtained in the investigation.

4. The CG-2692 contains information received by him and he was informed that all equipment aboard the vessel was in good working order at the time of the accident, and the Attachment "A" to the CG-2692 form so reflected this. To the best of his knowledge, information and belief, the information in the CG-2692 was and is true and correct and the CG-2692 did not contain any incorrect, misleading or inaccurate information nor did affiant hide or conceal any information.

5. He has reviewed the Complaint filed on behalf of Stuart H. Smith, Jr. in Civil Action No. 00-1878 "I" (5). He did not perpetrate any fraud or misrepresentation as alleged by plaintiff in articles XXXX, XXXXI, and XXXXII of the Complaint. To the best of his knowledge, information and belief, no one else representing Waterman Steamship Corporation perpetrated any fraud or misrepresentation as alleged by plaintiff in articles XXXX, XXXXI, and XXXXII of the Complaint.

s/s J. Kelly Duncan
J. KELLY DUNCAN

SUBSCRIBED AND SWORN TO
BEFORE ME, THIS 6th DAY OF
NOVEMBER, 2000.

s/s Donald L. King
NOTARY PUBLIC

Waterman
STEAMSHIP CORPORATION

An Affiliate Of
International Shipholding Corporation

December 12, 1996

Officer in Charge
Marine Inspection
U. S. Coast Guard
Marine Safety Office
1615 Poydras Street
New Orleans, LA 70112-2711

Attention: Commander K. B. Parris

Subject: **SS STONEWALL JACKSON -**
O.N. 557034
Astern Throttle Valve Repair

Dear Sir:

In reply to your 3 October 1996 letter regarding the alleged failure of the astern steam valve, I have enclosed a copy of the "IM0" DeLaval service report, copy of engine room log for 2, 3, 4 October 1992 and a copy of the deck officers log for 2, 3, 4 October 1992.

I have reviewed the deck and engine room log books for the whole voyage and have not seen any entry regarding astern steam valve failure. A review of the "IMO" DeLaval

service report notes that the "astern valve stuck open", this was . the reason "IMO" service technician was called in to begin with, the vessel was experiencing intermittent valve sticking while in "central" throttle mode, however, when the throttle control mode switch was switched to "direct electric" the valve became fully operational again within seconds. Since the throttle control system is fitted with three (3) means of control, two (2) remote, and one (1) local it was not considered a failure but rather an intermittent "mode" problem and we weren't sure if the intermittent problem was mechanical or electrical. Also stated in the "IMO" service report is what was found, recommended and that there were no further problems with throttle valve after opening and examining.

After the disassembly and reassembly in New Orleans and much adjusting, resetting and calibration the unit ran without further incident. While vessel was in dry-dock in May of 1993 the unit was overhauled with new parts and again put into service without incident.

In closing, I feel that although the intermittent stiching problem had been reported and measures taken to correct same were initiated. It was never felt that the valve had failed due to its intermittent nature and complete recovery within seconds, but rather some adjustment to this system was needed which appears to be what it was.

Sincerely,

WATERMAN STEAMSHIP CORPORATION

s/s Robert M. Potter
Robert M. Potter
Port Engineer

RMP/kb
cc: Mr. A. Redpath
Mr. W. M. Harrison
USCG File w1encls.

MCIR MARINE CASUALTY 25AUGO
INVESTIGATION REPORT

CASE NUMBER../ MC96018515 -I-NV INIT/ PORT/
NEWMS LAST UPDATE/ 14MAY97
CASUALTY TYPE: VESSEL/ X PERSONNEL/ FACILI-
TY/ POLLUTION/ MARPOL/
INCIDENT DATE/ 030CT92 TIME/ 1215 KNOWN/ X
ESTIMATED/ REF CASE/ MC9201693
NOTIFY DATE / 030CT96 TIME/ 1000 REPORTER
TYPE/ PARTY, NEC
SUBJECT F/S STONEWALL JACKSON; EQUIP
LOCAL FILE REFERENCE/
LOCATION POLAND ST. WHARF LOCAL CODE/
INCIDENT STATUS: VERIFIED/ NOT VERIFIED/
VERIFIED, NOT REPORTABLE/ X
NOTIFY/ ACTION: CTF/ X RETURN/ (TO IAPR)

--- VALIDATION AND ENDORSEMENT --

	End/Fwd	End/Cls	Return	User-ID	Name	Date
Investigator:	x			CW02		19DEC97
Unit Command:		x		LT	-	14MAY97

Dist Req? :
Hq Req? :

--- GENERAL INFORMATION ---
CITY/ NEW ORLEANS ST/ LA WATERBODY/
LOWER MISSISSIPPI RIVER
RIVER MILE/ 95.0 LATITUDE/ N 29-57.0
LONGITUDE/ W 90- 2.5
CAS SUMMARY:TYPE/ EQUIP FAIL CLASS/ NONE
POSSIBLE DRUG INVOLVEMENT?/ N PUBLIC
VESSEL/ BOATING/ DEATHS/ 0 MISSING/
0 INJURED/ 0 TOTAL DAMAGE/

ENV IMPACT: MODE/ SEVERITY CATEGORY/
MATERIAL CATEGORY/ OSC/ EPA REGION/
CLEANUP REQ?/
RESPONSE BY NSF?/ NSF TIME
TO RESPOND/ HOURS
NOTIFICATION FROM NRC?../ NRC CASE../
NOTIFICATION FROM APHIS?/ N
APHIS PORT/

--- INCIDENT BRIEF ---

Investigation of M/V STONEWALL JACKSON astern steam valve failure causing and/or not being reported in the referanced case of the allision of the M/V STONEWALL JACKSON on 030CT92. This investigation concludes the equipment problem of the sticking of the atern steam valve does not meet the requirments of a reportable marine casualty as defined in 46 CFR 4.05-1. The allision has been previously investigated, recommend Close To File.

--- ACTIONS REPORTED ---

SEL	CASE SUPPLEMENTS		
1	WITNESS LIST.....	(IAWL)/	
2	COMDT RECOMMENDATION.	(MCCR)/	
3	CASUALTY DETAILS	(MCDD)/	
4	NARRATIVE SUPPLEMENT.	(MCNS)/	
5	PERS ACTION RECOMMEND	(MCPA)/	0
6	POLLUTANT DETAILS	(MCPD)/	0
7	MARPOL DETAIL SUP....	(MCMD)/	0
8	OPERATIONAL CONTROLS	(PSOC)/	0
9.	PERSONNEL INVOLVEMENT	(MCPI)/	0
10	SMI SUPPLEMENT	(MCSI)/	0

11 TOWING SUPPLEMENT (MCTS)/ 0
12 SUBJECT SUPPLEMENT (MCSS)/
13 WEATHER FACTORS (MCWX)/

SEL EVENT SUPPLEMENTS
14 COLLISION OR GROUNDING. (MCCG)/ 0
15 EQUIP FAILURE ..... (MCDR)/ 0
16 FLOOD, CAPSIZE, SINKING.. (MCFC)/ 0
17 FIRE, EXPLOSION ..... (MCFE)/ 0
18 HUMAN FACTORS SUPP .... (MCHF)/ 0
19 HAZ MAT INVOLVEMENT .... (MCHM) 0
20 LIFESAVING SUPPLEMENT.. (MCLS)/ 0
21 PERSONNEL CASUALTY ..... (MCPC)/ 0
22 STRUCTURAL FAILURE ..... (MCSF)/ 0

–SUPPLEMENTS–
VESSELS INVOLVED/ 1 P M F P P S TOW
VIN NAME FLAG SERVICE D D R A I I REF
DMG
D557034 STONEWALL JACKSON
US FREIGHT SHIP NONE
ENF ACTIONS: REQ LOU/ REQ SURETY BOND/
NONE/ X
(ENTER HERE IF ASSOCIATED WITH AN MC CASE, OTHERWISE RECORD IN PSAR)

FACILITIES INVOLVED/ 0–

---INVESTIGATION RESOURCES UTILIZED ---